A

BUMIPUTRA-COMMERCE LEASING BHD

v.

NETHAVEN PACIFIC SDN BHD & ORS

B

HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[CIVIL SUIT NO: 22-6-2003]
26 FEBRUARY 2008

C ***CIVIL PROCEDURE:*** *Jurisdiction - Forum conveniens - High Court - Cause of action for breach of hire purchase agreement against guarantor - Territorial jurisdiction - Pleadings - Terms of agreement - Estoppel - Courts of Judicature Act 1964, s. 23*

D ***CONSTITUTIONAL LAW:*** *Courts - Forum for trial - High Court - Cause of action for breach of hire purchase agreement against guarantor - Territorial jurisdiction - Pleadings - Terms of agreement - Estoppel - Courts of Judicature Act 1964, s. 23*

E ***HIRE PURCHASE:*** *Breach of agreement - Default in payment - Claim against guarantor - Failure to register hire purchase agreement - Hire Purchase Registration Ordinance (Sarawak Cap. 71), s. 4*

CONTRACT: *Hire purchase - Guarantee - Breach - Claim against guarantor - Failure to register hire purchase agreement - Hire Purchase*
F *Registration Ordinance (Sarawak Cap. 71), s. 4*

This was a claim by the plaintiff against the 5th defendant as the guarantor for the breach of a hire purchase agreement by the 1st defendant, who was in default of the total outstanding balance of
G RM1,323,175.40. The 5th defendant raised two main defences: (i) the point of jurisdiction: the plaintiff by contract had agreed that there would be no cause of action in the courts of Sabah and Sarawak, as it pleaded in its statement of claim that the registered office was in Kuala Lumpur; and (ii) the plaintiff had failed to
H register the hire purchase agreement as required by the Hire Purchase Registration Ordinance (Sarawak Cap. 71) ('Ordinance').

Held (dismissing the plaintiff's claim):

(1) On the facts of this case, the parties had agreed to the
I territorial jurisdiction of the court to be the place of the registered office of the plaintiff. As per the pleading, it was in Kuala Lumpur. Further, the plaintiff had pleaded that they

would rely on the terms of the agreement. That being the case, the plaintiff would be estopped from placing arguments as was done in cases like *RHB Bank Bhd v. Kawood Sdn Bhd & Ors And Another Suit*, and many more cases argued on similar lines. When both courts *ie*, High Court of Malaya and High Court of Sabah and Sarawak, have jurisdiction over a matter, the provision of s. 23 of the Courts of Judicature Act 1964 ('CJA') can be applied to commence an action in a convenient forum in any one of the branches of the said High Court. However, if only one court has jurisdiction, s. 23 of the CJA can only be used to justify the commencement of proceedings within any of the branches of that particular High Court. Furthermore, the hire purchase agreement in this case had not been registered as required by s. 4 of the Ordinance; failure to comply with the law was fatal. (para 19)

Case(s) referred to:

Bank Bumiputra Malaysia Berhad v. Melewar Holdings Sdn Bhd & Ors [1990] 1 CLJ 1246; [1990] 1 CLJ (Rep) 654 HC ***(refd)***

Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 FC ***(refd)***

MBf Finance Berhad (Formerly known As Malaysia Borneo Finance Corporation (M) Bhd) v. Ting Kah Kuong & Anor [1993] 3 CLJ 492 HC ***(refd)***

People Insurance Co v. Sandul Singh [1964] AIR Pun 87 ***(refd)***

RHB Bank Bhd v. Kawood Sdn Bhd & Ors And Another Suit [2002] 2 CLJ 387 HC ***(refd)***

Sin Hai Estate Bhd & Ors v. Lim Jit Kim & Ors [2003] 1 LNS 16 HC ***(refd)***

Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1987] 1 LNS 55 HC ***(refd)***

Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co Sdn Bhd [1975] 1 LNS 173 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 5(1)(d), 93(7), 131
Bankruptcy Rules 1969, r. 101(1), (2)
Courts of Judicature Act 1964, ss. 3, 23(1)
Federal Constitution art. 121(1)
Hire Purchase Registration Ordinance (Sarawak Cap. 71), s. 4
Rules of the High Court 1980, O. 12 r. 4

For the plaintiff - Allan Lao; M/s David Allan Sagah & Teng Advocates
For the 5th defendant - Joseph Kahell Baleng; M/s Poh & Co Advocates

Reported by Suresh Nathan

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiffs' claim against the 5th defendant as the guarantor for the breach of hire-purchase agreement by the 1st defendant who was in default of the total outstanding balance of RM1,323,175.40 as at 8 July 2002 together with interest and costs.

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination.

The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purpose, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

Jurisdiction

[3] During the course of cross-examining the plaintiff's witness, the 5th defendant raised the point of jurisdiction. This issue was nowhere pleaded in the statement of defence. The 5th defendant says that cl. 23 of the said agreement provides:

> This agreement shall be deemed to have been made in the state in which the owner has its registered office and any proceedings in respect of any cause of action arising hereunder shall be instituted, heard and determined in a court of competent jurisdiction in the said state and it is agreed that such court shall possess territorial jurisdiction to hear and determine any such proceedings.

Though the defence of jurisdiction was not pleaded, the plaintiffs have asserted in their statement of claim para 5 that "The plaintiff will refer to the letter of offer and the agreement for their full terms and effect at the hearing and other proceedings of this action"

[4] It is clear from a reading of cl. 23 of the said agreement and the statement of claim, that the plaintiffs by contract has agreed that there will be no cause of action in the courts of Sabah and Sarawak as in the statement of claim they have pleaded that the registered office is at 6th Floor, 338, Jalan Tunku Abdul Rahman, 50100 Kuala Lumpur. The phrase jurisdiction and territorial jurisdiction need to be distinguished for the purpose of this case.

[5] Generally every court has its own territorial limits fixed by statutes beyond which it cannot exercise its jurisdiction or authority. The local jurisdiction of the High Court in Malaya comprises the territory of all the states in Malaya and of the High Court in Sabah and Sarawak, the territory comprised in the states of Sabah and Sarawak including in either case the territorial waters and air space above those states. The two High Courts namely the High Court in Malaya (consisting of number of High Courts of concurrent jurisdiction) and the High Court in Sabah and Sarawak (consisting of number of High Courts of concurrent jurisdiction) have co-ordinate jurisdiction and status and not concurrent jurisdiction. This distinction must be kept in mind when dealing with s. 23 of CJA 1964 or else much confusion will arise. One may have to choose which High Court is the right forum to apply s. 23. At times s. 23 may be applicable to both of the High Courts if both the High Courts have jurisdiction to hear the matter.

[6] Co-ordinate literally means, equal or of the same order or rank and not subordinate to the other. However, the literal meaning of co-ordinate jurisdiction in Malaysian context must be read with caution and with reference to case laws. The term concurrent literally means having the same authority, ie, concurrent jurisdiction means jurisdiction of several courts each authorised to deal with the same subject matter at the choice of the litigant, or jurisdiction exercised by different courts, at the same time, over the same subject matter, and within the same territory, and wherein litigants may, in first instance, resort to either court indifferently.

[7] In *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd.* [1975] 1 LNS 173, one of the issues was whether the plaintiffs who have their place of business in Tawau, Sabah can sue in Peninsular Malaysia as a firm. The

court held that the High Court in Malaya and the High Court in Borneo (now Sabah and Sarawak) have separate and distinct territorial jurisdictions, Hashim Yeop A. Sani observed:

> After Malaysia Day, a peculiar set up was established in respect of the judicial powers of the Federation. Article 121 of the Federal Constitution and the Courts of Judicature Act, 1964 set out the jurisdiction of the High Courts. The question is what is meant by "jurisdiction" in the context of the Constitution and the Courts of Judicature Act, 1964? Counsel for the plaintiffs seeks to rely on the purported interplay of the definitions of "High Court" and the "local jurisdiction" and section 7(2) of the 1964 Act. Section 3 of the Courts of Judicature Act, 1964 defines "High Court" to mean "the High Court in Malaya and the High Court in Borneo or either of them, as the case may require." The definition of "local jurisdiction" sets out the territorial jurisdiction of the High Court in Malaya and the High Court in Borneo. Section 7(2) of that Act provides that all writs, summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of the court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia.
>
> According to counsel for the plaintiffs a distinction must be drawn between the meaning of 'jurisdiction' and 'local jurisdiction' in the 1964 Act. If I get him right, I think what he means is simply this that where the word 'jurisdiction' is used it means the whole of the jurisdiction of both the High Court in Malaya and the High Court in Borneo, that is to say the whole of Malaysia, purporting to rely on the definitions of 'High Court' and 'local jurisdiction' in section 3 of the Courts of Judicature Act, 1964. But in my view that would be unduly stretching the meaning of 'jurisdiction' in Order 48A rule 1 of the Rules of the Supreme Court, 1957. There is no doubt at all that what Order 48A rule 1 speaks about is territorial jurisdiction and it is all too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdiction. Article 121(1) of the Constitution speaks of the two High Courts having 'co-ordinate jurisdiction' and the definition of "local jurisdiction in the Courts of Judicature Act, 1964 speaks of the territorial jurisdiction of each of the two High Courts. Section 7(2) of the 1964 Act should not be misconstrued for what that subsection does is simply to get Supreme Court, 1957 for convenience for otherwise unnecessary difficulties will arise in the process of the courts within Malaysia.

> The enactment of section 7(2) of the 1964 Act itself would strengthen the argument that the framers of the 1964 Act recognised the distinctive territorial jurisdiction of the two High Courts in Malaysia. I do not believe and there is nothing to suggest that subsection attempts also to do away with Order 48A rule 1 either expressly of by necessary implication.

(see *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55).

[8] For a proper appreciation of the above case one must understand and be familiar with the following terminologies: "(i) co-ordinate jurisdiction; (ii) concurrent jurisdiction; (iii) territorial jurisdiction; (iv) local jurisdiction; and the provisions in:

(a) article 121(1) of the Federal Constitution which states:

> There shall be two High Courts of co-ordinate jurisdiction and status, namely:
>
> (i) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
>
> (ii) one in the States of Sabah and Sarawak which shall be known as the High Court in Sabah & Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine.

(b) section 3 of CJA 1964 which defines 'local jurisdiction' to mean:

> (i) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Trengganu; and the Federal Territory of Kuala Lumpur and
>
> (ii) in the case of the High Court in Sabah and Sarawak, the territory comprised in the Borneo States, namely, Sabah and Sarawak, including, in either case, the territorial waters and the air space above those States and the territorial waters.

(c) section 23(1) CJA 1964 which states:

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where -

A (i) the cause of action arose,

(ii) the defendant or one of several defendants resides or has his place of business,

(iii) the facts on which the proceedings are based exist or are
B alleged to have occurred, or

(iv) any land the ownership of which is disputed is situated, within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of
C the other High Court.

(d) RHC O. 12 r. 4 which reads:

References in these rules to the time limited for appearing are references -
D

(a) in the case of a writ served within the local jurisdiction of each High Court in Malaya, to eight days and served outside such local jurisdiction but within the jurisdiction of Malaya, to twelve days after service of the writ (including the day of
E service) or, where that time has been extended by or by virtue of these rules, to that time as so extended.

[9] In *Sova*'s case the court made some attempts to define and distinguish some of the above terminology, referring to the Federal Constitution and the Courts of Judicature Act but without
F referring to the important provision of O. 12 r. 4 of RHC 1980. The court held that a High Court located at Penang or at Alor Setar is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless
G of whether the cause of action arose in another state. (see *Sogelease Advance (Malaysia) Sdn Bhd v. Kemajuan Tat Yong Sdn Bhd & 4 Ors, Bank Bumiputra Malaysia Berhad v. Melewar Holdings Sdn Bhd & Ors* [1990] 1 CLJ 1246; [1990] 1 CLJ (Rep) 654, *Sin Hai Estate Bhd & 3 Ors v. Lim Jit Kim @ Lim Tian Jee & 19 Ors*
H [2003] 1 LNS 16).

[10] It must be asserted that the word 'local jurisdiction' also appears in O. 12 r. 4 of RHC 1980. However the definition 'local jurisdiction' as propounded in the cases of *Syarikat Nip (supra)*
I and *Sova*'s case may not apply to the intended meaning of 'local jurisdiction' in O. 12 r. 4. The intended meaning of 'local jurisdiction' in this rule may appear to refer to the administrative

area of the branch of the High Court, which in most of the cases will cover the territory of each state where the branch of the High Court is situated. A branch of the High Court of Malaya is situated in most states to enable a party in a civil action to have easy access to the High Court of Malaya in a state where either the plaintiff or defendant resides. In my view, similar situation applies in Sabah and Sarawak; the definition of 'local jurisdiction' in s. 3 of the Courts of Judicature Act 1964 refers to the territorial jurisdiction of the High Court in Malaya and the territorial jurisdiction of the High Court in Sabah and Sarawak. However the words 'local jurisdiction' in O. 12 r. 4 do not refer to the territorial jurisdiction of High Court of Malaya but only refers to the administrative area of the branch of the High Court of Malaya as assigned to it.

[11] In *RHB Bank Bhd v. Kawood Sdn Bhd & Ors And Another Suit* [2002] 2 CLJ 387 among the issues debated was whether on the facts, the High Court in Sabah and Sarawak at Sibu has the jurisdiction and was the proper forum to hear and adjudicate the first and second suits. Clement Skinner J made the following observations:

(a) Section 23(1)(b) of the Court of Judicature (CJA) confers on the High Court in Sabah and Sarawak at Sibu the jurisdiction to hear the instant suits as the first defendant in each suit has a place of business at 153, 2nd Floor, Jalan Kampong Nyabor 96000, Sibu and at No 2B, 2nd Floor, Brooke Drive, Sibu respectively, which is within the local jurisdiction of the High Court in Sabah and Sarawak;

(b) The decision in *Fung*'s case cannot be read to mean that in a case such as this where several defendants are sued, and some are resident or have a place of business in Sarawak and some in Malaya, the High Court in Sabah and Sarawak cannot exercise jurisdiction to try the same because the dispute did not arise within its local jurisdiction;

(c) There is no justification for giving s 23(1)(b) of the CJA a restricted and narrow construction as Parliament had intended that the court will nevertheless have jurisdiction if one or several of such defendants reside or have a place of business within the local jurisdiction of the court;

(d) To construe s. 23(1)(b) of the CJA in the manner that the defendants wish this court to would clearly be contrary to the intention of the legislature in enacting that the provisions

of s. 23(1)(a), (b), (c) and (d) of the CJA are to be read disjunctively by the use of the word "or" between each of the said provisions;

(e) It cannot be said that by giving effect to the provisions of s. 23(1)(b) of the CJA, the High Court in Sabah and Sarawak is "assuming" jurisdiction of a matter emanating from West Malaysia. There is no need to "assume" jurisdiction as jurisdiction is conferred by virtue of the fact that one of the defendants has a place of business within the local jurisdiction of the court;

(f) By the terms of the guarantees under which they are sued, the refusal to pay by the second defendant would have arisen in Sibu, Sarawak and by the third defendant at Johore Bahru. Hence their contention that the cause of action in each suit arose or emanated from Selangor Darul Ehsan is unacceptable.

Plaintiffs' Argument On Jurisdiction

[12] On this issue, the plaintiffs contend that the hire purchase agreement is deemed to have been made in Kuala Lumpur and as such the plaintiffs say it is not a convenient forum. The plaintiffs submit that Sibu, Sarawak is the more appropriate forum. The submission of the plaintiffs read as follows:

(a) On question of forum conveniens:

In the case of *American Express Bank Ltd v. Mohamed Taufic Al-Ozier & Anor* [1995] 1 CLJ 273, Supreme Court, Peh Swee Chin SCJ, referred to the judgment in the *Spiliada* which propounded the fundamental principle of doctrine non conveniens that:

> ... there is some other tribunals, having competent jurisdiction, in which, the case may be tried more suitably for the interest of all parties and for the ends of justice ... Lord Goff cautioned the word "conveniens" in forum non conveniens meant sutability or appropriateness of the relevant jurisdiction and not one of convenience.

(b) Strong cause and other relevant factors:

In *UOL Factoring S/B v. Voon Shin Sion @ Foo Shin Siong* [1999] 1 LNS 195, High Court Kuala Lumpur, Abdul Aziz J:

> … in considering the question of the most appropriate forum to try the action, took into account the existence of an agreement to submit to jurisdiction as a strong factor but nonetheless went on to consider other relevant circumstances …

(i) that the 1st, 2nd, 3rd an defendants have their place of business and/or reside in Sibu, Sarawak

(ii) That the said subject matter of the property in dispute being heavy vehicles are all located in Sarawak.

(iii That both the plaintiffs and defendants have already submitted to the jurisdiction of the Sibu High Court in Sibu, Sarawak. The 5th defendant did not enter conditional appearance and has already filed their defence in this case and the jurisdictional issue is not raised in the 5th defendant's defence.

Both of the Hire Purchase Agreement (Exhibit P1) and the Guarantee (page 28-29 of Enclosure 109) have been duly stamped at the Stamping Office in Kuala Lumpur.

Alternatively, the plaintiffs have chosen to waive their right under the **second part of clause 23** which is to have the case tried in Kuala Lumpur. The provision in Clause 23 has been phrased for the sole benefit of the plaintiffs namely that the place of contract is deemed to have been made in the State where the plaintiffs have their registered office and that the plaintiff is entitled to file this suit in Kuala Lumpur.

Syarikat Sinar Sahabat v. Nam Thye Co. (L.D.) Sdn. Bhd., High Court, Tawau, Tan Ian HC Chin J:

> ... it is thus a term imposed by the plaintiff for the sole benefit of the plaintiff, the plaintiff can, without the assent of the defendant, waive compliance (*Chitty on Contracts*, 25th Edn., Vol. 1, para 1501). There is, therefore, no substance in the contention of the defendant that it was an express term …

Chitty on Contract, Volume 1, General Principles, 26th Edition, (The Common Law Library Number 1) Para 1611:

> Waiver of condition for benefit of one party: where the terms of a contract include a provision which has been inserted solely for the benefit of one party, he may, without the assent of the other party, waive compliance with that provision and enforce the contract as if the

provision has been omitted. He will not be permitted to do so where the provision has been inserted for the benefit of both parties or where there is in reality no concluded agreement.

Law Of Jurisdiction

[13] It is trite that by agreement jurisdiction to court cannot be given or forfeited. Support for the proposition can be found in a number of cases. (see *People Insurance Co. v. Sandul Singh* [1964] AIR Pun 87; *Sin Hai Estate Bhd & Ors v. Lim Jit Kim @ Lim Tian Jee & Ors* [2003] 1 LNS 16).

[14] In addition, when a party submits to the jurisdiction of a court and takes a chance, he cannot challenge the jurisdiction. Such a rule has a number of exceptions in Malaysia; more so when it deals with the issue of territorial jurisdiction rather than jurisdiction *per se*. This was dealt with in the case of *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life And General Insurance Co. Sdn. Bhd.* [1975] 1 LNS 173. In *Fung Beng Tiat v. Marid Construction Co.* [1997] 2 CLJ 1, it was argued that the creditor ought to have presented his petition in the High Court in Sabah and not in the High Court in Malaya pursuant to r. 101(1) and (2) of the Bankruptcy Rules 1969 ('the Rules'), because the debtor was, for the one year preceding the presentation of the petition, neither a resident in Kuala Lumpur nor in any other state within Peninsular Malaysia but an ordinary resident in Sandakan, Sabah. Counsel for the creditor argued, *inter alia*, that: (i) the debtor by engaging counsel in Kuala Lumpur had submitted to the jurisdiction of the High Court in the capital city; (ii) it was open for the creditor to present its petition in any state within the Federation and that the proceedings could, after the making of the receiving and adjudication orders, be transferred to the state in which the debtor was resident pursuant to ss. 5(1)(d), 93(7) and 131 of the Act; (iii) s. 131 operated to save the petition in any event as the alleged defect or irregularity did not occasion any injustice to the debtor. These arguments found favour with the judge who dismissed the notice to oppose and adjourned the petition to another date for hearing. The debtor appealed against the order of dismissal. The Federal Court *inter alia* held:

(1) It is crystal clear from art 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court

in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over dispute that arise within its territory. There is no Federal legislation that confers power upon the one High Court to transfer proceedings to the other; *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life & General Insurance Co. Sdn. Bhd.* [1975] 2 MLJ 115 followed.

(2) The doctrine of submission to jurisdiction, which is part and parcel of private international law, applies to jurisdiction that a court has over a particular litigant, and has nothing whatsoever to do with the territorial authority of a court. The expression 'jurisdiction' is one that takes its colour from its context, and for that reason, great care must be taken in its use to the facts of a particular case. Once it is recognized that what was in issue was territorial jurisdiction, then there could arise no question of a submission. Jurisdiction in the sense in which it applies in the present case cannot be conferred by consent or waiver. The judge was quite wrong when he thought otherwise.

Failure To Register Under The Ordinance

[15] One of the main line of defence of the 5th defendant is that the plaintiffs had failed to register the hire purchase agreement as required by Sarawak, Hire Purchase Registration Ordinance (Chapter 71) now repealed. That s. 4 of the said Ordinance says that:

No instrument of hire-purchase of movable property shall be valid unless registered in manner prescribed by this Ordinance.

[16] On this issue the plaintiffs submit as follows:

The Hire Purchase Agreement (Exhibit P1) need not have to be registered under the Hire Purchase Registration Ordinance (Sarawak Cap. 71) which has been repealed with effect from 30-08-2007. Refer answer No. 36 of WSPW 1. However, due to human error, the Hire Purchase Agreement was duly registered on 13-08-2003 after this suit has been filed and hence the registration has no significance.

Submit It is the plaintiffs' submission that the said Hire Purchase Agreement is valid because it is not necessary to be registered under Section 4 of the Hire Purchase Registered Ordinance (Sarawak Cap. 71) because of the effect of clause 23 of the Hire Purchase Agreement.

(It is pertinent to note here that the plaintiffs are relying on cl. 23 of the agreement which I have dealt with earlier on jurisdiction).

[17] The case of *MBf Finance Berhad (Formerly known As Malaysia Borneo Finance Corporation (M) Bhd) v. Ting Kah Kuong & Anor* [1993] 3 CLJ 492 illustrates the applicability of s. 4 of the Hire Purchase Registration Ordinance (Chapter 71). His Lordship Abdul Kadir Sulaiman J (as he then was) in the said case opined:

> Though it is not a hire-purchase within the province of the Act, any other hire-purchase instrument involving movable property is required by section 4 of the Hire-Purchase Registration Ordinance of Sarawak (Cap 71) to be registered.

Other Defences

[18] There are numbers of other defences which the 5th defendant had raised. The case can be summarized as follows:

The Hire Purchase Agreement was void and/or invalid and/or unenforceable:

(a) it is *void initio* as the plaintiff had contravened section 4(1) of the HPA 1967 by failing to give 1st defendant a duly completed written statement consisting of a summary of its financial obligations prior to the agreement as set out in 2nd schedule HPA 1967

(b) it contravenes Section 30 of the HPA 1967 by failing to calculate the term charges in relation to the Hire Purchase Agreement in accordance with the formula set out in the 6th Schedule of the HPA 1967.

(c) It is unenforceable as the plaintiff had failed to comply with section 5(1) HPA 1967 in failing to supply the 1st defendant with a copy of the said Agreement within 14 days from date of its execution.

(d) Interest on late charges at the rate of 1.75% per month is:

(i) void and of no effect as it contravenes with section 34(c) of the HPA 1967

(ii) excessive and/or unreasonable and is a penalty as provided for in section 75 (d) Contracts Act 1950 and is therefore irrecoverable.

(e) Failure of plaintiffs to discharge their obligations in maintaining the said vehicles:

(i) upon receiving Letter of Demand from the plaintiffs' solicitors dated 11-03-2002 and 04-04-2002 the 5th defendant has *via* two letters dated 11-03-2002 and 07-05-2002 notifying the plaintiffs of the conditions of the vehicles but the plaintiffs have failed to respond.

(ii) the plaintiffs have contravened section 92 Contracts Act 1950 whereby the plaintiffs being the owner of the vehicles had failed to discharge their obligations in respect of maintaining the said vehicles. This has affected 5th defendant's right as surety and their eventual remedy against the 1st defendant has been impaired and therefore should be discharged as a guarantor.

(iii) Failure of the plaintiffs to discharge their obligations in respect of maintaining the said vehicles contravened section 94 Contracts Act 1950 and it deprives the 5th defendant's right to the benefit of the plaintiffs' securities against the 1st defendant and the 5th defendant should be discharged to the extent of the value of the security.

(f) The 5th defendant had resolved on 04-11-1995 that the limit of the corporate guarantee in favour of the plaintiffs was limited to RM 936, 000.00 and this was communicated to plaintiffs on 21-11-1995. That the plaintiffs' being aware of the said Resolution and limit is estopped from recovering any sum exceeding the said limit.

I do not find any merits in the 5th defendant's argument as it is my finding that the several provisions of HPA 1967 relied by the 5th defendant is not applicable in this case.

Conclusion

[19] I have heard the evidence and read the submission of the parties in detail. I take the view that the plaintiffs' claim must be dismissed. My reasons are as follows:

(i) I have dealt with the issue of jurisdiction in the earlier part of the judgment. On the facts of this case the parties have agreed to the territorial jurisdiction of the court to be the place of the registered office of the plaintiff. As per the pleading, it is in Kuala Lumpur. Further, the plaintiffs had pleaded that they will rely on the terms of the agreement.

That being the case, the plaintiffs will be estopped from placing arguments as was done in cases like *RHB Bank Bhd v. Kawood Sdn. Bhd. & Ors And Another Suit* [2002] 2 CLJ 387, and many more cases argued on similar lines. It is my judgment that when both courts ie, High Court of Malaya and High Court of Sabah and Sarawak, has jurisdiction over the matter, the provision of s. 23 can be applied to commence an action in a convenient forum, on any of the branches of the said High Court. However, if only one court has jurisdiction, the provision of s. 23 can only be used to justify the commencement of proceeding within any of the branches of that particular High Court.

(ii) Further, the hire purchase agreement in this case has not been registered as required by s. 4 of the Hire Purchase Ordinance of Sarawak. Failure to comply with the law is fatal.

[20] For reasons stated above, I dismiss the plaintiffs' claim against the 5th defendant with costs. The getting up fees shall not exceed RM30,000. If costs cannot be agreed, the 5th defendant is at liberty to tax the costs.